NO. 82-16

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAY BALL,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit
(No. 81-5546)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The District Court committed reversible error in handling the situation of Jurors Bowman and Phillips. The procedure implemented by the District Court denied the petitioner an impartial jury.

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Jay Ball, prays that a writ of certiorari issue to review the opinion and judgement of the United States Court of Appeals for the Sixth Circuit entered against the petitioner on May 7, 1982.

OPINIONS BELOW

There were two opinions in the United States District Court for the Eastern District of Tennessee. Two copies of the District Court relative to the jurors appear at Appendix, infra p. A - 1.

The opinion of the Court of Appeals appears at Appendix, infra p. A9.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) to review the order of the United States Court of Appeals for the Sixth Circuit entered on May 7, 1982.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Constitutional Provision involved in this matter is the Sixth Amendment right to trial by an impartial jury.

The petitioner was convicted of violating 18 U.S.C. Section 2313.

The Sixth Amendment provides:

"RIGHTS OF THE ACCUSED. - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. Section 2313 provides:

Whoever receives, conceals, stores, barters, sells or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five (5) years, or both.

STATEMENT OF THE CASE

This is an appeal by the petitioner, Jay Ball, hereinafter referred to as Ball from a conviction in the United States District Court for the Eastern District of Tennessee, Northeastern Division, Judge Charles G. Neese, presiding on a ten count indictment charging the petitioner, Ball, with ten counts of selling various stolen motor vehicles over a 13 month period in

violation of 18 U.S.C. Section 2313.

As a result of the hereinabove mentioned indictment the District Court on April 9, 1981 issued a probation revocation warrant to Ball based on a conviction on June 20, 1969 for violations of 26 U.S.C., Sections 5179, 5173, 5205(a)(2) and 5604 (a)(1). (U.S.A. v. Jay Ball, No. 7045).

On May 18, 1981, a jury trial commenced resulting in a guilty verdict on ten counts in Cr. 2-81-09 on May 27, 1981. Ball filed a timely motion for new trial which was denied on June 16, 1981.

After a presentence investigation, Ball was sentenced on July 15, 1981. He was committed for imprisonment for five (5) years on Count I, and five (5) years on Count II of the indictment, said sentences to be served consecutively. Imposition of sentence on Counts III-X was suspended and he was placed on probation for five (5) years, consecutive to the terms of imprisonment.

Ball was also sentenced on No. 7045, receiving a committed sentence of five (5) years consecutive to the sentence in CR. 2-81-09. On July 15, 1981, Notice of Appeal was timely filed.

On May 7, 1981, the Sixth Circuit Court of Appeals issued an opinion affirming the District Court conviction.

REASONS FOR GRANTING THE WRIT

The petitioner was denied an impartial jury as graranteed by the Sixth Amendment of the United States Constitution.

Both the District Court and Court of Appeals have erroneously held that the petitioner was accorded a fair and impartial jury.

After the jury panel had begun to hear testimony, during the eventing of May 18, 1981 juror 52, Bowman, received a telephone call at his home from an unidentified caller.

The gist of the caller's conversation was that such caller understood that Mr. Bowman was under instruction not to discuss this case, but that there "is a lot ov money floating around" in connection with it. Mr. Bowman replied that he was not interested and concluded the conversation.

It should be noted that Juror Bowman did not report this incident until May 21, 1981. He sat through testimony while trying to decide what to do about the incident. He then reported the incident on the morning of May 21, 1981.

Prior to the commencement of trial, Ball's attorney stipulated in writing that a valid verdict might be returned by less than 12 jurors should the court find it necessary to excuse one or more jurors for any just cause after the trial herein commences, provided, the Court consults with counsel of record for the plaintiff and each defendant herein before determining the existence of such just cause.

An evidentiary hearing was held in chambers with the petitioner and

his attorneys present. Juror Bowman stated that he was uninfluenced by the call and that he could remain a fair and impartial juror. Bowman did not state as to whether or not he had been influenced while listening to the testimony after the call.

The petitioner moved to dismiss Juror Bowman. The District Judge denied the motion to remove.

Betty J. Phillips was elected the original foreperson after the jury began to deliberate.

The District Judge summarily excused Mrs. Phillips over the objections of defense counsel that he did not want to waive any material matter. Defense counsel further requested that in the event Mrs. Phillips was removed that Bowman also be removed. The District Court refused this request.

The trial judge refused to remove Juror Bowman after prejudicial contact had been established. The only conclusion that Bowman could possibly have drawn was that the petitioner or someone in his behalf initated such contact. There is a presumption that such private conversation by the caller with a juror was prejudical to the petitioner. Remmer v. United States, 347 U.S. 229. This is, however, a rebuttable presumption. Albeit, a rebuttable presumption, the burden rests heavily on the government to overcome such presumption.

The District Judge, without conducting a hearing, determined that foreperson Phillips had become disqualified to perform her duty as fair and impartial juror from facts and circumstances never sworn to. Juror Phillips was not allowed, as was Bowman, to explain whether or not she was an impartial juror.

As was stated in United States v. Doe, 513 F.2d 709 (1st. Cir. 1975), if the court finds that a communication between jurors and a third party has occurred, it must determine whether or not it was prejudicial and develop a record that affords an adequate basis for review. This procedure was following in juror Bowman's case but was abandoned in Foreperson Phillips' case. U.S. v.Richman, 600 f.2d. 286 (1st Cir. 79).

Juror Bowman had already received an outside communication. When foreperson Phillips was excused with no explanation to the jury, it could only serve to indicate to Juror Bowman that the attempts to bribe members of the jury was still being pursued. Leaving Bowman, after excusing Phillips, had to only benefit the government.

In the case of United States v. Forrest, 620 f.2d. 446 (5th. Cir. 1980) the Court stated:

"When there had been an attempt at jury tampering, the court must guard against the possibility that the jury will assume one of the parties was responsible for the attempt, and, based on that assumption, decided the merits of the case unfavorably to that party. Stimack v. Texas, 548 F.2d. 588 (5th. Cir. 1977); United States v. Herring, 568 F.2d 1099 (5th. Cir. 78) (conviction reversed because jury had been exposed to

newspaper report that life of government witness had been threatened). The Court must also guard against the possibility that the tampered with juror will comment on the merits of the case in the presence of the other jurors. United States v. Ferguson, 486 F.2d 968 (6th. Cir. 1973). Whether the comments are favorable or unfavorable to the defendant is immaterial. (Emphasis supplied).

In the Forrest, supra case the court further provided: "It makes no difference in this case that it was Forrest himself who initiated the contact that may have poisoned the jury. We reject the suggestion that Forrest may not be heard here to complain of the results of his own misconduct. He has been convicted of jury tampering and for that misconduct is subject to punishment. That is an entirely discrete matter. At issue in his trial in this case whether Forrest had dealt in stolen goods, not whether he had tried to corrupt the judicial system. A fair and impartial jury cannot be permitted to draw the conclusion that because defendant attempted to fix his trial, he is guilty of the offense for which he is being tried. It is conceivable that a defendant, innocent of the charge being, might attempt to tamper with a jury to assure a favorable verdict."

The petitioner submits that:

(1)Impermissible contact was had with Juror Bowman;

(2) That the governmant failed to establish that the conduct with Juror Bowman was not prejudicial.:

(3) That no contact with Juror Phillips was ever established;

(4) That the trial judge committed reversible error in excusing Juror Phillips without an investigation;

(5) That leaving Juror Bowman on the jury after excusing Juror Phillips only served to highlight to Juror Bowman what he already knew; that there were attempts to bribe the jury.

(6) That the Sixth Circuit Court of Appeals ruling that the alleged misconduct of the petitioner should not require a reversal and a new trial flies in the face of the Sixth Amendment to the United States Constitution and holdings of other circuits.

The Sixth Circuit Court of Appeals characterized the proof as "overwhelming". The case involved whether or not the petitioner knew the vehicles were stolen when he sold them. The petitioner never denied selling the vehicles only that he knew they were stolen. The only direct proof of knowledge of the character of the vehicles came from one government witness, William Coffey. The case boiled down to the testimony of William Coffey versus Jay Ball.

CONCLUSION

Petitioner urges that the question presented needs to be settled by the Court. It needs to be made clear what is required of a trial judge in circumstances where contact with jurors have been made or alleged.

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT OF THE
EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. CR-2-81-9
JAY BALL, Defendant.	)	

MEMORANDUM OPINION AND ORDER

The unsequestered jury was impaneled, sworn and instructed by the Court herein on Monday, May 18, 1981. Among the instructions received by each juror was the admonition to report to the Court "* * * at your very next opportunity * * * " any communication with him or her undertaken by anyone relating to such service as a juror.

On the same evening, juror No. 52 on current panel No. 2, Mr. Brownlow George Bowman, seated in this trial as juror No. 2, received a telephone call at his home in Greene County, Tennessee from an unidentified caller. Mr. Bowman was of the impression that such caller was male and a White person; beyond that, he had no indication (or even "a guess") as to the identity of his caller or in whose behalf such call may have been made.

The gist of the caller's conversation was that such caller understood that Mr. Bowman was under instruction not to discuss this case, but that there " * * * is a lot of money floating around * * *" in connection with it. Mr. Bowman replied that he was " * * * not interested * * * " therein and undertook to conclude the conversation. Before, he was able to replace the receiver of his telephone, Mr. Bowman was asked if he knew any of his fellowjurors, replied that he did not, and concluded the call.

Mr. Bowman testified that he hardly knew whether to interpret the call he received as " * * * a threat or as an attempted bribe. * * * " He resented the effort which he interpreted as an effort to " * * * intimidate me * * * " and was determined not to be intimidated by anyone" * * * inside of Court or outside of Court. * * * " He mulled-over the issue of what he might do to thwart any effort to intimidate him in his jury-service herein throughout

the second day trial, turned-and-tossed until after midnight as he tried to sleep that night, and decided he would report the incident to the Court the next morning.

After the juror arranged through the clerk of the Court for an interview with its presiding judge, an evidentiary hearing was conducted by such judge which was taken-down in its entirety by the official court reporter assigned to this division. Mr. Bowman said under his oath taken previously that he held no concept as to which, if either, "side" on this lawsuit may have been or not been implicated in the call he received; that he had not communicated the fact of its receipt to any fellow-juror or anyone else (except the clerk of this Court to arrange the interview), except as necessary briefly to satisfy the limited curiosity of his wife (who had answered the telephone when the call was received). He stated that, in so far as he knew and believed, his wife had not communicated to anyone the fact of the call or its content.

Mr. Bowman testified that he remained uninfluenced in any way by the foregoing incident; that he would make no decision the jury herein is required to make any differently on account of it than he would have made had it not occurred; and that he was confident he could remain fair and impartial as a juror herein. Upon the resumption of trial, counsel and the defendant were summoned to Chambers; the testimony of Mr. Bowman was read to them in its entirety from the foregoing notes of the court-reporter; and they were given the opportunity to interrogate Mr. Bowman further.

Thereupon, Mr. Bowman was excused from the hearing, and the defendant moved that Mr. Bowman be dismissed from the jury and that the trial proceed with 11 jurors. ★/ The Court took such motion under advisement and enjoined all participants therein not to reveal to anyone the fact or content of such hearing. Trial was resumed for its 3rd day with the panel of 12 jurors as initially constituted.

The procedure followed by the court enabled the Court to determine the circumstances surrounding the untoward incident, any impact thereof upon the juror Mr. Bowman, and that no prejudice to the defendant Mr. Ball resulted. Remmer v. United States (1954), 347 U. S. 227, 229-230, 74 S. Ct. 227, 98 L. Ed. 654, 656 (see headnote 2); cited in Morgan V. United States, C. A. 5th. (1968), 399 F. (2d) 93, 96-97, certiorari denied (1969), 393 U.S. 1025, 89 S. Ct. 635, 21 L. Ed. (2d) 568, (observing the continuing vitality of the principle laid down by Justice Holmes in Patterson v. People of State of Colorado (1907), 205 U. S. 454, 462, 27 S. Ct. 556, 51 L. Ed. 879, 881, that conclusions to be reached in a case are to be induced only by evidence and argument in open court and not by outside influence form private talk or

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★/ The parties had stipulated pretrial that the unanimous verdict of less than 12 jurors would constitute the verdict of the jury if any juror or jurors was or were dismissed from the panel for good cause prior to the return of any final verdict. See Rule 23 (b), Federal Rules of Criminal Procedure.

public print, as illustrated more recently by Sheppard v. Maxwell (1966), 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. (2d) 600; Estes v. State of Texas (1965), 381 U. S. 352, 85 S. Ct. 1628, 14 L. Ed. (2d) 643, rehearing denied (1966), 382 U. S. 875, 86 S. Ct. 18, 15 L. Ed. (2d) 118; and Irvin v. Dowd (1961), 366 U. S. 717, 81 S. Ct. 1639, 6L. Ed. (2d) 751), ibid., 399 F. (2d) at 96, n. 1.

There is no showing that any juror herein may have been affected by the incident except Mr. Bowman; he had not related his experience to any other juror and maintains under oath that he will not. The only problem, therefore, was whether Mr. Bowman would reach a different conclusion in this action because of the impact upon him of the private talk thrust upon him by an outsider to the trial, and whether the occurrence of the incident might in some way prejudice the defendant Mr. Ball.

There is a presumption that such private talking by the outsider with a juror herein was prejudicial to the defendant Mr. Ball which, for obvious reasons, is rebuttable. Remmer v. United States, supra, 347 U. S. at 229, 98 L. Ed. at 656 (headnote 1). Were the presumption not rebuttable, all a defendant in a criminal trial would need to do to gain a mistrial would be to call-up, or caused to be called-up, a sufficient number of jurors to render the continuance of his or her trial an impossibility.

That presumption was rebutted here by the positive testimony of the juror Mr. Bowman that the private call he received had no impact upon him which would interfere with his continuing to be fair and impartial in the performance of his duties as a juror herein, and that the conversation would not cause him to make any decision the jury is required to make herein any differently than he would have made it had he not received the call. The Court, accordingly, hereby DETERMINES that there was no prejudice or other harm to the defendant Mr. Ball emanating from the private talk of any anonymous caller with the juror Mr. Bowman.

The Court announced at the hearing an intention to interrogate the members of the jury as a unit in a general manner at some point in the trial to determine whether any member other than Mr. Bowman had been contacted in a similar or other manner. No such contact has been reported. Upon mature reflection, it is concluded that such an inquiry would only serve to alert the other jurors to the fact that Mr. Bowman had been called and that someone was undertaking to interfere with the jurors' performance of their duties. This was the error committed earlier in this Court which appears to have contributed to its reversal for not discharging all the jurors and declaring a mistrial. Stone v. United States, C. A. 6th (1940), 113 F. (2d) 70.

For all such reasons, the motion of the defendant Mr. Ball, that the juror Mr. Bowman be discharged as a member of the jury and that the trial proceed with 11 jurors, in accordance with the pretrial stipulation of the parties, hereby is OVERRULED. The Court is giving consideration to making appropriate inquiries when and if the jury reports a unanimous verdict to

ascertain if the foregoing conversation affected such verdict(s) in any manner.

ENTER

C. G. Neese)
United States District Judge

IN THE
UNITED STATES DISTRICT COURT OF THE
EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. CR-2-81-9
JAY BALL, Defendant.	)	

MEMORANDUM AND OPINION

I

The parties stipulated in writing pretrial with the approval of the Court that a valid verdict may be returned herein by a jury of less than 12 jurors should the Court find it necessary to excuse one or more jurors for any just cause after trial commenced. Rule 23 (b), Federal Rules of Criminal Procedure. Such rule is constitutional. Patton v. United States (1930), 281 U.S. 276, 298-300, 50 S.Ct. 854, 74 L. Ed. 854, 863-864 (headnote 6); accord: Williams v. Florida (1970), 399 U.S. 78, 86, 90 S. Ct. 1893, 26 L. Ed. (2d) 446, 452-453 [7].

The Court found it necessary to excuse juror No. 37, Mrs. Betty J. Phillips, seated as juror No. 7 and its presiding officer herein, after trial and deliberations of the jury herein had commenced. The Court determined that such juror had become disqualified to perform her duty as a fair and impartial juror from facts and circumstances which so convinced the Court, involving the defendant, one of his witnesses, and the husband of such

juror who had been a spectator throughout the trial. "* * * A juror may be descharged * * * when facts and circumstances are presented which convince the Court that a juror's ability to perform his [or her] duty has become impaired. * * * "United States v. Floyd, C. A. 2d (1974), 496 F. (2d) 982, 990 [9].

Those facts and circumstances which had convinced this Court that such juror's ability to perform her duty had become impaired were communicated on the record fully in Chambers in consultation with counsel of record for the parties before the determination was made. The juror Mrs. Phillips was cischarged from the jury thereafter out of the presence of all other jurors; the other 11 jurors were instructed to select another of their number to preside over their deliberations; and the jury was instructed to resume its deliberations, which it did.

II

While agreeing that, under the aggregate of the circumstances presented, the discharge from the jury of Mrs. Phillips was probably indicated, counsel of record for the defendant renewed his motion that at the same time the juror Mr. Bowman also be discharged therefrom. See memorandum opinion and order herein of May 22, 1981. The motion was again denied, although its content remains "of active concern" to the Court and will be pursued if any unanimous verdict is returned herein.

The Court, having determined earlier that any unanimous verdict of the jury will not be contaminated by the private talk thrust upon Mr. Bowman by an anonymous telephone-caller, it would be necessary to interrogate the remainder of the jurors before amending that determination. The Court is justified in not interrogating other jurors in this situation at this time and perhaps bringing to their attention that someone might be undertaking to influence the jury improperly. United States v. Brown, C. A. 6th (1978), 571 F. (2d) 980, 990-991 [10], [11].

File:

(C. G. Neese)
United States District Judge

IN THE
UNITED STATES DISTRICT COURT OF THE
EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. CR-2-81-9
JAY BALL, Defendant.	)	

MEMORANDUM OPINION AND ORDER

The defendant Mr. Ball moved timely for a new trial, Rule 33, Federal Rules of Criminal Procedure, after his conviction by a jury of 10 violations of the Dyer Act. The motion borders on frivolity, including as it did a request for a new trial on the ground that the Court erred in failing to grant a mistrial, when there had been no motion for a mistrial, and on the ground that the Court erred in giving the jury the so-called "Allen Charge", when it has been approved repeatedly by theSupreme Court as well as the United States Court of Appeals for this Circuit.

The first two such grounds relate to the sufficiency of the evidence. ★/ There was ample evidence from which the jury could have found Mr. Ball guilty beyond a reasonable doubt under each of the 10 counts of the indictment herein. As to each count, the only viable dispute was whether , at the time he sold the particular motor vehicle, Mr. Ball " * * * then knew the said motor vehicle to have been stolen. * * * '

The possession by Mr. Ball of the 10 motor vehicles, admittedly recently-stolen, was sufficient to make a prima facie case that he knew they were stolen. United States v. Stephens, C. A. 6th (1974), 492 F. (2d)

★/ The first such ground urges error in the failure of the Court to grant the motion of Mr. Ball for a judgment of acquittal at the conclusion of the evidence. Such motion went to the sufficiency of the evidence to support a verdict. United States v. Cox, C. A. 6th (1979), 593 F. (2d) 46, 48 [1, 2]. Interestingly, Mr. Ball did not renew his motion for a judgement of acquittal after the discharge of the jury. See Rule 29 (c), Federal Rules of Criminal Procedure.

1367, 1373 [3], certiorari denied (1974), 419 U. S. 852, 95 S. Ct. 93, 41 L. Ed. (2d) 83 and sub nom. Silverman v. United States (1974), 419 U.S. 874, 95S. Ct. 136, 42 L. Ed. (2d)114. Whether the defendant had the requisite state-of-mind was an issue of fact required to be submitted to the jury, morissette v. United States (1952), 342 U.S. 246, 274, 72 S. Ct. 240, 255 [10], 96 L. Ed. 288, to be determined by it from the circumstantial, as well as direct, evidence. Schwachter v. United States, C. A. 6th (1959), 237 F. (2d) 640, 643 [1-3].

The Court has discussed thoroughly the matters relating to the 3d and 4th grounds urged in support of the motion. See memoranda opinions and orders herein of May 22, 27, 1981. The discharge of the juror Mrs. Phillips was in accordance with the stipulation herein of May 18, 1981 and without objection by the defendant.

Subsequent events have not convinced the Court that its earlier determination, " * * * that there was no prejudice or other harm to the defendant Mr. Ball emanating from the private talk of an anonymous caller with the juror Mr. Bowman * * * ," was incorrect; following the return of the verdicts herein and the poll of the individual jurors, the Court interrogated them as to whether any of them had any knowledge of the telephone-call received by Mr. Bowman or had been subjected to any outside influence of any character. The court is convinced that the verdicts returned herein were induced only by evidence and argument in open court and that no prejudice to Mr. Ball resulted from these unfortunate events.

The admission in evidence of Mr. Ball's prior convictions of felonies under Rule 609 (a), Federal Rules of Evidence, was proper. See ruling on admissibility of evidence herein of May 22, 1981. Appropriate limiting instructions were given the jury both at the time the evidence was introduced as well as in the Court's instructions. Cf. United States v. Yopp, C. A. 6th (1978), 577 F. (2d) 362, 366.

The giving of the Allen-type, see Allen V. United States (1896), 164 U. S. 492, 17 S. Ct. 154, 41 L. Ed. 528, supplemental instructions to the jury was not error. United States v. Nickerson, C. A. 6th (1979), 606F. (2d) 156, 158-159 [4], certiorari denied (1979), 444 U.S. 994, 100 S. Ct. 528, 62L. Ed. (2d) 424; United States v. Giacalone, C.A. 6th (1978), 588F. (2d) 1158, 1166-1167 [6], certiorari denied (1979), 441 U.S. 944, 99 S. Ct.2162, 60 L. Ed. (2d) 1045; United States v. Lariche, C. A. 6th (1977), 549 F. (2d) 1088, 1092-1093 [1 - 6], certiorari denied (1977), 430 U. S. 987, 97 S. Ct. 1687, 52 L. Ed. (2d) 383; cf. United States v. Scott, C. A. 6th (1977), 547 F. (2dz0 334, 336-338. The Court's instructions were carefully tailored to conform with the law of this circuit and the language implicity approved by the Supreme Court in Kawakita v. United States (1952), 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249. See United States v. Biacalone, supra, 588 F. (2d) at 1166-1167. That the jury reached unanimous verdicts some 1½ hours after giving of the supplemental instructions cannot be considered in determining whether the instructions were improper; such is a factor to be considered only if it were determined first that the instructions were improper. Ibed.,

588 F. (2d) at 1167-1168 [7].

As always, the Court did its best to see that Mr. Ball received a trial free from any error.

No. 81-5546

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[FILED MAY 7, 1982]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CR - 2-81-9
CR - 7045

JAY BALL,
Defendant-Appellant.

ORDER

Before: EDWARDS, Chief Judge; ENGEL, Circuit Judge; and CECIL, Senior Circuit Judge

Appellant Jay Ball was tried by a jury and convicted of ten counts of knowingly selling a stolen vehicle which is a part of interstate commerce in violation of 18 U.S.C. 2313. The government's theory has been that Ball, who admittedly sold at least ten stolen vehicles, had paid one William Coffee to steal the cars for him. Ball denied knowing the cars were stolen, and claimed that he was duped by Coffee into believing the vehicles were legitimate salvage.

On appeal, Ball claims first that there was insufficient evidence to prove that he knew the vehicles in seven of the ten counts were stolen. Second, he argues that the district court erred when it ordered the government to state to the jury the plea agreement it had made with William Coffee in exchange for his testimony against Ball; Ball claims that in describing this agreement to the jury the government impermissibly vouched for Coffee's credibility. Third, the appellant insists that it was error for the district court to refuse to dismiss one of the jurors, a Mr. Bowman, who had received an anonymous phone call at home during the trial by someone who told hem that there was "a lot of money floating around" in connection with the case. Fourth, Ball claims that the distirct court abused its discretion by removing the foreperson of the jury, one Phillips, during deliberations, after it was discovered that the husband of the juror had been talking a great deal with the defendant and a defense witness outside the courtroom during the trial. Finally, the defendant objects to the wording of the so-called Allen charge which the district judge gave to the jury after it had deliberated for some eight hours and after the judge received a note from the jury foreman expressing doubt as to the jury's ability ever to reach a unanimous verdict.

Prior to the commencement of the trial, Ball's attroney stipulated in writing, pursuant to Rule 23(b) of the Federal Rules of Criminal Procedure, that a valid verdict might be returned by less than 12 jurors "should the

Court find it necessary to excuse one or more jurors for any just cause after the trial herein commences, provided, the Court consults with counsel of record for the plaintiff and each defendant herein before determining the existence of such just cause." (emphasis added).

Upon a careful consideration of the record as a whole, the court is of the opinion that the trial judge did not err in failing to dismiss juror Bowman, nor under the unusual circumstances here did he err in excusing foreperson Phillips during the course of jury deliberations, especially where it appeared that Ball's counsel concurred that just cause existed for the discharge of Mrs. Phillips. In an extensive statement upon the record made by the District Judge, not challenged as to accuracy by the defendant or his counsel, it appeared that the foreperson's husband had been observed repeatedly during the course of the trial in conversation not only with the defendant, Ball, but with one of defendant's witnesses.

The evidence of defendant's guilt can only be characterized as overwhelming. To require a reversal of the trial because of conduct in which the defendant himself appears to have participated could only serve to encourage its repetition by others who could seize the opportunity to hedge similarly against an anticipated adverse verdict. The trial judge appears to have been scrupulously fair in his handling of this difficulty so as to minimize any potential adverse impact and appears further to have exercised the discretion given trial judges in such matters with tact and care. The court further concludes that defendant's other claims on appeal are without merit. In exposing the agreement between the informant Coffee and the government, the result was not to permit the government to vouch for the credibility of the witness but rather to expose the witness to potential impeachment by showing his self interest. The modified Allen charge which was given the jury was not inappropriate under the circumstances, and the trial court was careful to avoid language which has been disapproved by this court in U.S. v. Harris, 391 F. 2d 348 (6th Cir. 1968).

Upon a consideration of the record as a whole, the court is further of the opinion that the defendant was accorded a fundamentally fair, if not perfect or errorless, trial. Accordingly,

IT IS ORDERED that the judgement of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

ISSUED AS MANDATE: JUNE 2, 1982

EXCERPTS FROM QUESTIONING OF JUROR BOWMAN, JUROR No. 52

THE COURT: If there is no preliminary matter to come to the attention of the Court, call the case on trial, please, clerk.

THE CLERK: No. CR-2-81-9, United States of America versus Jay Ball.

THE COURT: Is the Government ready?

MR. BLACKWELL: Yes, your Honor.

THE COURT: Is the defendant present and ready?

MR. GORDON BALL: Yes, your Honor.

THE COURT: Ladies and gentlemen of the jury, we have a matter which needs to be taken up in your absence. Don't you have any discussion about this case at this time. Take charge of the jury , please Mr. Marshal. (Thereupon, the jury retired to the jury room.)

THE COURT: I will see counsel, the defendant, the court reporter, the clerk, and other officers of the court in chambers. (The following transpired in Chambers:)

THE COURT: This morning one of the jurors, No. 2 in the box, wanted to report a matter to me and discuss it with me and I had the following conversation with him which the court reporter will now read.

COURT REPORTER (Reading shorthand notes):

THE COURT: Mr. Bowman, we are making a record of this because it is involved in a criminal trial.

Q Will you please state your name and Juror number?

A Brownlow Bowman, Juror No. 52.

Q You are serving as a juror in the case of United States of America versus Jay Ball, which is now on trial. Is that correct?

A Yes, sir.

Q Would you tell me what has happened that affects your jury service?

A Night before last between 8:00 and 9:00 o'clock, I guess, I received an anonymous telephone call unidentified male person, and my wife answered the phone and they asked for me. She just handed me the phone and someone asked if I was on this case, the Ball case, and I said, "Yes." He said, "I know you are not at liberty to discuss anything about it," but he said, and this is the term he used, "A bunch of money is floating around." And I told him I didn't think I would be interested in anything like that. Before I could hang up, he said, "Do you know any of the other jurors?" And I said, "No." He said, "Well, thank you." That was the telephone conversation.

Q Did this take about a minute or two?

A Yes.

Q Did you have any indication whatever from the listening to the voice and what was said about who it might have been?

A I couldn't place his voice.

Q Did it sound familiar to you at all?

A No, sir.

Q Was it a voice you ever thought you heard before?

A I don't believe it is one I ever heard over the telephone before. Telephone changes voices, but I don't believe I ever talked to that particular person over the phone.

Q Did it have any resemblance to any voice you heard not on the telephone?

A Well, not really.

Q Have you mentioned this to anyone else besides the Clerk of the Court?

A No, sir. My wife during the conversation she was sitting in the livingroom and when I hung the phone up, she said, "I don't think anybody should bother you like that. Do you?" And I said, "No."

Q Was that the extent of the conversation?

A Yes.

Q So far as you know, has she mentioned it to anybody besides you?

A No.

Q Do you feel this would have any tendency to make your decision in any matter that the jury must decide differently than you would have without the call in any way?

A No, sir. I refuse to be intimidated by anybody inside or outside of this courtroom.

Q Do you feel that you could continue as a juror and not be affected in any way by this when you have heard and seen all of the evidence and listened to the instructions of the judge and decide it just as you would have decided it before?

A I believe so.

Q Are you pretty sure about that?

A I am sure about it.

Q Do you have any guesses in your mind about who might have been or who they might have been representing?

A Well, really, I don't. I have not really even tried to guess about it because if I started guessing, I would start wondering which side it was for and I just refused to speculate on it at this time.

THE COURT: All right, Mr. Bowman, we will need to get the lawyers and the defendant in here and maybe to through and follow this same procedure. "What I will do is call the case and when the rest of the jurors go to the jury room, you come back in here when I do that and don't say anything to any of them." "Thank you so much. This is the mark of a good citizen to report something like this. I know it is unpleasant for you."

MR. BOWMAN: You are right, it is not. I foundered over this yesterday and last night until approximately 1:30 or 2:00 o'clock and finally decided it is not my job, but your job.

THE COURT: That's right. We will see what can be done about it. We want the defendant and the government to have a fair trial by an impartial jury and we will let the lawyers see what they think about it. "Thank you

very much."

THE COURT: Mr. Bowman, is that the way you remember the conversation completely?

MR. BOWMAN: Yes, sir.

THE COURT: Does the government have any questions of Mr. Bowman?

MR. BLACKWELL: None that I know of.

THE COURT: Does the defendant have any questions of Mr.Bowman?

MR. GORDON BALL: Mr. Bowman, you don't have any idea who called you one way or the other?

MR. BOWMAN: No, sir.

MR. GORDON BALL: Would you still be able to . . . could you lay that aside and still give both the prosecutor and the defense a fair trial?

MR. BOWMAN: I believe so. I know so. I did this trying to be fair to the government and trying to be fair to Mr. Ball. I don't know Mr. Ball one way or the other. I have never seen him before. I did it to be fair, if possible, either way. I took it more as a warning instead of a bride or something like that. I had a feeling . . . anybody gets a feeling in something like that, and I had a feeling if anybody would contain me into it, it might be possible it would get deeper and deeper and that is why I didn't continue into it. I didn't feel like it was my place.

THE COURT: Any other questions?

MR. STRAND: Have you communicated this to other jurors or only to Judge Neese?

MR. BOWMAN: Only to Judge Neese.

THE COURT: Any other questions by the defendant?

MR. STRAND: I was wondering what effect this would have on the other jurors?

THE COURT: Do you have any questions?

MR. BOWMAN: None of the other jurors will ever know anything about this so far as I am concerned.

THE COURT: Any other questions?

MR. GORDON BALL: Not for the defendant.

THE COURT: Mr. Bowman, if you will excuse us, we may have to call you again. If you will stay in the secretary's office a little while, I will appreciate it. Thank you very much.

(Mr. Bowman retires from Chambers.)

THE COURT: What is the government's feeling about this matter?

MR. BLACKWELL: Based on what I heard and what Mr. Bowman said, we don't have any problem with him remaining on the jury.

THE COURT: What is the defendant's feeling about the matter/

MR. GORDON BALL: If your Honor please, Mr. Bowman was quite candid. I am sure he will try to do his best, but I don't know that he could

really put that out of his mind. He said he considered it more of a threat, the way it sounded to me, than a bribe. I don't know that he could.

THE COURT: What are you saying?

MR. GORDON BALL: I would ask that he be removed as a juror because I don't really think he can. We have a stipulation to use eleven.

THE COURT: Yes.

MR. GORDON BALL: I don't really like to do that.

MR. STRAND: Would there be any pressure put on him with the other jurors asking or inquiring about the proceeding here?

THE COURT: I intend to have some customary instruction about that.

MR. GORDON BALL: It might cause some maybe to begin to wonder. I realize your Honor will give the customary instructions.

THE COURT: What I think it gets down to is the proposition of whether or not anyone or other members of the jury have been infected so far as making decisions that the jury must make. The jury has to decide not only the guilt or innocence of the defendant in ten counts, but has to decide many other things, for example, the credibility of the witnesses, the weight of the evidence, the effect of the evidence, and in many collateral decision to the central issues.

Mr. Bowman, whom I have reason to believe because of his previous service here, and his service at this time, and the fact he reported it, albeit perhaps he should have yesterday, I am sure it was a great burden on his mind about whether to report it or not.

He seems to me to be very conclusive in his mind that he can be fair and imparial in the trial and not make any decision he otherwise would make differently because of this occurence. He says that he has not mentioned it to any other jurors and it would be very unlikely that any other jurors would hear about it from any other source unless some other juror has been contacted or is contacted.

I think it would be somewhat a reflection on him, under the circumstances, to say, "Well, even so, we are going to dismiss you from the panel."

MR. GORDON BALL: I realize that. It would seem to me at this point in time, since he has been contacted by someone, that it would have . . . I guess the test is whether he himself could put it out of his mind. It would be very difficult for him to lay that aside. He listened to the testimony yesterday and I am sure he was thinking about it.

THE COURT: You are just assuming that. I have to assume what he is saying under oath here is correct.

MR. GORDON BALL: I realize that is the test.

THE COURT: This is sort of along the same line as saying somebody who read something about the case or heard it discussed can't put that aside and try the case on the evidence and the law.

I have been doing this for twenty years and i know it can be done.

I Will consider the matter further and if we proceed with the trial, the matter will remain under consideration. I don't think it would be wise, in

the administration of justice, to dismiss him as a juror now and we will keep the matter under advisement and I perhaps would want to repeat a proceeding such as this before the case finally goes to the jury.

Are you moving for a mistrial or are you moving the trial not go forward with Mr. Bowman on the panel?

MR. GORDON BALL: I am moving at this point in time the trial not go forward with Mr. Bowman on the panel. I am not moving for a mistrial.

THE COURT: I will keep that in mind.

MR. GORDON BALL: I don't know if any other members of the jury have been contacted in this matter and I don't know if there is any way your Honor could inquire about that without alerting them. There might be somebody in Mr. Bowman's position as he was yesterday.

THE COURT: I might later in the trial sort of review with the jury in a way and at a time wouldn't appear so apparant generally the instructions that I have given them, and then specifically ask them as a group at that time if they have read anything in the newspaper about it, and so forth, and cover it that way without being specific and saying "Has anybody called you on the telephone and made what you thought was an offer of a bribe or threat?" I don't think that would be wise.

MR. GORDON BALL: I think that will be fine.

THE COURT: We will that course about the matter. I want to consider the matter still further here in view of your motion.

Thank you very much.

Everyone present is enjoined not to reveal the fact of this conference or anything that occurred in here.

At this point all the parties in Chambers returned to the courtroom.

THE COURT: Bring in the jury, please.

(Thereupon, the jury returned to the courtroom, and the following proceedings were had:)

THE COURT: Ladies and gentlemen, you may or may not have noticed only eleven persons were in the jury room. You must not speculate or wonder about that in any way and go on and do what you would have done otherwise. Call your next witness.

MR. BLACKWELL: We call Cindy Whitmire.

THE COURT: If there is no preliminary matter to come to the attention of the Court, call the case on trial, please Clerk.

THE CLERK: No. CR-2-81-9, United States of America versus Jay Ball, your Honor.

THE COURT: Is the Government ready?

MR. BLACKWELL: Yes, your Honor.

THE COURT: Is the defendant present and ready?

MR. STRAND: Yes, your Honor.

THE COURT: I assume Mr. Ball is not here ?

MR. STRAND: He had to be in criminal Court of Appeals this morning, your Honor.

THE COURT: All right. I will see counsel and the defendant in Chambers, please. (Thereupon counsel and defendant entered the Chambers following the Court, and the following transpired:)

THE COURT: Mr. Strand, is the defendant present in Chambers?

MR. STRAND: He is, your Honor.

THE COURT: The Court has for consideration after the trial is commenced and while the jury is deliberating the question of whether it has become necessary to excuse the Juror Mrs. Phillips for just cause from the jury panel and the Court wishes to consult with counsel in the determination of the existence of just cause. It has been reported verbally to the Court that the defendant Mr. Ball and Mr. Phillips, whom the Court is advised is the husband of the juror Mrs. Phillips, going into the men's room together during breaks in the trial, staying for an unusually long time, and these two persons engaging in heavy conversations during almost every break in the trial which was noticed all during the last half of the trial, the defendant, Mr. Phillips and Mr. Ronnie Shultz, who was a witness for Mr.Ball, engaged in close talking on the past Friday, Mr. and Mrs. Phillips showing concern . . . that is, Mrs. Phillips showing concern when Mr. Phillips was not in the courtroom during instructions to the jury and inquiring of his whereabouts and evincing extreme concern for his safety; Mr. Phillips and Mr. Shultz sitting together and conversing in the courtroom on Friday after Mr. Shultz had appeared as a witness, and Mr. Ball, Mr. Phillips and Mr. Shultz sitting together in the hall and talking on this past Friday; the defendant Mr. Ball and Mr. Phillips entering the building together shortly after the jury had retired to commence its deliberations; and another report of Mr. Ball, the defendant,and Mr. Phillips going into the men's room together on Friday, and also talking in the halls, and after the retirement of the jury, when this matter had been called to this reporter's attention, noticing the defendant, Mr. Ball, Mr. Phillips, Mr. Shultz, and members of Mr. Ball's family talking and appearing to be very friendly.

And I might add to that. Of course, Mr. Shultz was identified as a prospective witness and as the Court recall Mrs. Phillips did not say anything about knowing him, and while the jury was out, Mr. Phillips and Mr. Shultz going down the steps together near the elevator and staying

about fifteen minutes, and coming back about a minute apart after their departure, and when Mr. Phillips and Mr. Shults were seated in the courtroom, a conversation between Mr. Phillips and Mr. Shultz, which was not too clear, but appeared to the reporter to be "That's my wife that's tied it up," or "That's my wife that has got it tied.

This was in a loud whisper and the person who reported this could not be certain that is what was said.

All of these things, combined with the general circumstances of the case, make the Court think that there is just cause to relieve Mrs. Phillips and have the jury proceed with eleven jurors and to proceed to elect a new foreman.

I will be glad to hear anything counsel for either side has to offer as the Court makes this determination.

MR. BLACLWELL: We had that concern Friday afternoon, your Honor, in view of what had happened, and my opinion has not changed since that time.

THE COURT: Does the defendant's lawyer have anything to say?

MR. STRAND: I feel like, from talking to my client, all of it has been innocent from what Mr. Ball has told me. He was sitting out there and Mr. Phillips voluntarily come up and began a conversation with him. There has not been anything intentional on his part, just the fact apparently, from what Mr. Ball said, he is very talkative person, very outgoing person and he voluntarily comes up, but there has not been anything so far as Mr. Ball or any member or prospective witness on his behalf or members of his family, been intentionally done by any means.

THE COURT: Assume for purposes of this part of the discussion that it is all innocent, do you agree or do you not agree, it looks pretty peculiar in the trial on a felony lawsuit?

MR. STRAND: Yes, your Honor, to be candid with the Court, it certaintly does.

THE COURT: Under those circumstances, as the government thinks the Court should determine the existence of just cause, if defendant would agree there is just cause and let the juror be descharged and go on with the trial.

MR. STRAND: I think we would have to.

We would, your Honor, again like to renew our motion as to Mr. Bowman then. We would ask that in the event Mrs. Phillips is excused, that Mr.Bowman also be excused.

THE COURT: The Court has no further reason. Do you have any further reason to think that there is just cause for excusing mr. Bowman?

MR. STRAND: Just the implication it might leave in the jurors minds, the remainder of the jurors.

THE COURT: Am I to understand you do agree the Court should determine that there is just cause existing for the discharge of Mrs. Phillips?

MR. STRAND: In light of what the Court has cited this morning, and

being a former Judge myself, I would have to agree the Court would be correct . . . even though I disagree. I think in all candor there is enough there and I would have to say yes. I believe the Court would have just cause in finding it.

THE COURT: The Court then will call Mrs. Phillips in first and discharge her from the jury, and the Court then will call the other 11 jurors back in and instruct them that Mrs. Phillips will not be with them any more and to choose a new presiding officer, and will also give them some further instructions. And, also the Court is keeping the Bowman situation very actively in the Court's mind, but at this time I see no reason to change the rule the Court has already made as to Mr. Bowman.

If you or other counsel, or anyone not an officer of the Court, has any additional information about Mr. Bowman, or any other juror any time, the Court is expecting you to bring that to the attention of the Court.

Thank you very much, gentlemen .

MR. STRAND: Your Honor, could I leave the courthouse and go to another attorney's office and do some work and be on call?

THE COURT: Yes, if you will let the Clerk know where you are so you can get back immediately.

MR. STRAND: Yes, your Honor.

(Thereupon, the Court, counsel for both sides, and defendant returned to the courtroom, and the following proceedings were had:)

THE COURT: Mr. Strand, is the defendant present in the courtroom?

MR. STRAND: Yes, your Honor.

THE COURT: Mr. Marshal, will you bring Mrs. Phillips in, please? Just ask her to stand behind the rail. (Thereupon Mrs. Phillips, a juror, returns to the courtroom and stands behind the rail, and the following transpired:)

THE COURT:Good morning, Mrs. Phillips.

The Court has determined that a just cause exists to descharge you as a member of the jury and the Court wants to thank you for all of the time, attention, and effort you have given to this matter.

You are free to go, if you would like to.

MRS. PHILLIPS: Thank you. (Thereupon, Mrs. Phillips leaves the courtroom.)

THE COURT: Mr. Marshal, bring the other members of the jury in, please. (Thereupon, the 11 remaining jurors returned to the courtroom, and the following transpired.)

THE COURT: Good morning, ladies and gentlemen.

We have lost a member of the jury who happened to be your presiding officer. It is going to be necessary for you to select another presiding officer and resume your deliberations. If you haven't arrived at and reported a verdict by about 11:30, I suggest . . . and this does not mean you have to have a verdict by 11:30, of course. You are under no time limitation. But if you have not arrived at one about 11:30, I suggest you do return to the courtroom

at that time so arrangements may be made for you to separate and go to lunch.

The Court will not be disturbing you in any way or calling you to come in, unless some emergency requires it.